

*Alexander Mill of Hatton and Others, Appellants.  
Colonel Robert Reid and Others, Respondents.*

## The Respondents Case.

THE City of *Montrose* in *Scotland*, by the Set or Regulation of the Borough, is governed by a Town-Council, consisting of Nineteen Members, *viz.* a Provost or Mayor, three Bailiffs, a Dean of Guild, a Treasurer, a Master of the Hospital, and Ten Common Council-men, who are all Merchants, and Two other Common Council-men, who are Tradesmen or Mechanicks, and are annually chosen or named about *Michaelmas* by the Town Council that served for the Preceding Year, seven of whom are to be continued Common Council-men for the Year following, and twelve new are to be chosen.

The Method of Election is this. Upon the Day of Election, which is appointed by the Set or Constitution of the Town to be the *Wednesday* before *Michaelmas*, all the Magistrates and Common Council-men meet in the Town-House; or at least a Majority of the whole, being Ten, and as many more as can attend; and there the Old Council Elects the New, with this Restriction, that the Provost, the three Bailiffs the Dean of Guild, Treasurer, and Master of the Hospital, for the immediate Preceding Year are continued *ex Officijs*, Members of the Council for the Year immediately following.

At the last *Michaelmas* Election, *James Scot* of *Logie*, the then *Provost*, and the Appellants, were most anxious to continue themselves, and their Friends, in the Management of the Publick Good of this City, and for the better Support of their Interest to introduce into the Council, Strangers not Living or Trading within the Town. But finding that the Majority of the then Town-Council, would be for bringing a new Set of Burgeses into the Publick Management, they resolved to prevent some of the Common Council-men (who would not fall in with their Measures) from coming to the Council at the Time of Election, and in order thereto, the then *Provost* order'd four of the Common Council-men to be carried to Prison the Morning of the Election, upon Pretence of some personal Insult or Disrespect to himself.

Most of the Council-men thinking the Liberties and Privileges of the Borough infringed by this Method of Proceeding, did absent themselves from this pretended Meeting; but sent Mr. *Murison*, one of their Number, to protest against the illegal Practices thereof, and to offer Bail for the Four Common Council-men's appearing immediately after the Election should be over, to answer to any Charge which could be brought against them.

By the Law of *Scotland*, and Custom of this Borough, no Election can be carried on, unless there is a Majority, *viz.* Ten of the Town Council present.

The Appellants and their Associates, finding their Number was but Eight, did reckon Mr. *Murison*, (who went there only to Protest against their Proceedings) as the Ninth, and to make up the Tenth they made one of their Friends, appear as Proxy, for one of the absent Councillors, without any Warrant or Order for so doing, and then chose a new Town Council; upon which, they put some of their Friends, who were not in a Capacity of bearing any Office within that Borough.

Mr.

*Interlocutor vanced & an addition made to them.*

Mr. *Muirison* protested against all these illegal Proceedings, and demanded that the four Councillors, who were imprisoned, should be Liberate before they went on to an Election, and offer'd Bail for their appearing afterwards, to answer for any Crime they could be charged with, which was refused.

Immediately after this irregular Election was over, the four Councillors were set at Liberty, and have never been, as yet, so much as prosecuted for the Crimes then alledged against them.

As soon as these Four were Liberate, Eleven Members of the Town Council, being the Majority of the whole, did meet and proceed to a regular and due Election of Magistrates and Common Council-men for this present Year, and did bring their Action of *Declarator* and *Reduction* before the Lords of Session, against the pretended Town Council set up by the Appellants and their Associates, who having got into Possession of the Government of this City, do still illegally detain the same.

At the Hearings of this Cause, before one of the Lords of Session, the Respondents insisted upon the Election of the Appellants being declar'd Void; because, First, There was not a Majority or Quorum of the Town Council present, when this Election was made. Secondly, That there was no free Election, four of the Common Council-men being imprison'd without any Cause, before the Election came on, and detained Prisoners till the Election was over, tho' Bail was offer'd for their Appearance.

To which the Appellants pleaded, that the Action being brought to overturn the Election of Mr. *Scot of Logie*, as Provost or Mayor of *Montrose*, and the other Magistrates of the same Town, upon an alledg'd Act of Violence committed by Mr. *Scot*, the Respondents could not proceed in their Action against Mr. *Scot*, because of his Privilege of Parliament, nor against the Appellants, who were the other Defendants, because they were in Society together, and therefore no Action could lie against them unless Mr. *Scot* were made a Party.

The Respondents answered, that they did not then insist against Mr. *Scot*, but only against the other Magistrates, who could claim no Advantage from Mr. *Scot's* Privilege; nor could his Absence or Non appearance retard the Respondents Proceeding in their Action, they having done what was in their Power to make him a Party to the Suit.

1st Interl. 22 This Plea was over-ruled by two several Interloquitors, and the Respondents were allowed to proceed in their Action for making Void the Election of all the Defendants, except Mr. *Scot of Logie*.  
Dec. 1712.

2d Interl. 27  
Dec. 1722.

Thereafter, the Cause was, upon a Petition, order'd to be heard before the whole Lords of Session, when after a long Debate, They found *Logie's* Privilege could not be pleaded to stop the *Declarator* against the other Defendants as not Elected by a sufficient Quorum. Against which Interloquitor, there was a long Petition offer'd, which being refused, the Cause came again to be heard before the whole Lords; and the Appellants still insisted on *Logie's* Privilege, as a Protection for them, and further objected against this last Interloquitor of the 8th of January 1722-3.

3d Interl. 8  
Jan. 1722-3.

Obj. That by the Set or Regulation of the Town of *Montrose*, there was no Quorum fix'd, and therefore the Councillors, who met at the ordinary Time and Place of Election, might proceed to the Election of a Town Council for the Year ensuing, whether they were a Majority of the whole Town Council or not, and brought a Precedent of such a Practice in the Year 1719, when there was but eight present at the Election of a new Town-council, and those eight chose Proxies for two to make up the Number Ten.

The



## [ 3 ]

*Ans.* The Respondents answer'd, that tho' by the written Set of the Town, no *Quorum* was expressly fix'd, yet Custom and Reason determin'd, that no Number of the Town-council, under Ten, which is a Majority of the whole, could proceed to do Business, more especially Business of such Weight, as the Election of a new Town Council; for if any lesser Number should be allow'd, it would be impossible to determine where to fix, or why Two or Three met together in the Council-House, may not be a *Quorum*, and have a Power to elect a new Town-council, or determine Business of the greatest Consequence to the Town; nor could any Argument be brought from the Precedent mention'd by the Appellants, since they could not shew it was ever practis'd within that Town, either before or since.

Upon this Debate, the Lords of Session without making any Alteration in their last Interloquitor, Found, that Logie's Privilege could not <sup>4th Interl. 19 Jan. 1723.</sup> stop the Pursuers from insisting in that Reason of Reduction of the Election of the other Members, viz. That some of the Members of the Council were unwarrantably imprison'd by Mr. Scot of Logie.

*Object.* The Appellants at last alledg'd, that tho' it should be proven, that some of the Councillors were imprison'd by Mr. Scot's Order, yet that could not hinder the other Councillors to proceed to an Election that Day; nor could any Act of Mr. Scot's, or any other single Councillor, be sustain'd, as a Ground of Reduction of the Election of the other Magistrates and Common Council Men, who were innocent; nor was it in the Power of the Town Council, when met, to Liberate the Members, who were imprison'd by Warrant of a Magistrate, because they as a Town Council, had no such Authority or Jurisdiction.

*Ans.* The Respondents answer'd, that they insisted upon it as a sufficient Ground of Reduction, that some of the Members were illegally imprison'd and detain'd from the Election by the Provost of the Town, who by this Means got himself re-elected as Provost, and the Appellants brought in as Magistrates or Common Council Men.

The Lords of Session found it relevant, to Annul the Election of the <sup>5th Interl. 19 Jan. 1723.</sup> other Members; that Logie unwarrantably imprison'd some of the Members of the Council, during the time of the Election.

The Appellants have appeal'd to your Lordships, complaining, that they are agriev'd by the said Interloquitory Order of the Eighth of January, and the said two Interloquitories of the 19th. But the Respondents humbly hope, that these Interloquitories will be found to be Just, for the Reasons following.

1<sup>st</sup>. Because the Lords of Session allow'd of Mr. Scot of Logie's Privilege of Parliament, as a Protection to himself, without entring into any Dispute, whether that Privilege could protect him against an Action brought against him as a Member of a Corporation; and the Respondents apprehend he could not by such Priviledge, protect his fellow Magistrates and Common-council Men from the Respondents just Suit, there being nothing more ordinary, than where Members of Parliament are jointly and severally bound in Bonds with others, than the bringing Actions against the other Persons bound, tho' no Suit is commenc'd against the Members, upon Account of their Privileges.

2<sup>d</sup>. Because it appears, from the very Facts themselves, that these Members were imprison'd, in order, to influence the Election, and to prevent a Majority of the Town-Council's being against the Provost and his Friends, which would have hapned, if a free Election had been allow'd; for, the Appellants themselves acknowledge, that Six or Seven

Seven of the Town-Council were walking in the Streets, and would not come up to the Place of Election, which Number, with the Four that were imprison'd, would have made a Majority of the Town-Council; but by this Act of Mr. Scot's, he procur'd himself to be elected as Provost, and his other Friends to be brought in as Magistrates or Common-council Men, for the Year then ensuing. And therefore, tho' the Appellants had been entirely ignorant of the Imprisonment of the Four Common council Men, yet the Election of them as Magistrates, or Common-Council Men, being the Effect of this Act of Violence, ought to be declar'd void; For in such Cases, *Non queritur utrum is qui convenitur an, alius Vim fecit.*

3d. The Appellants were all accessary to this illegal Act, in so far as they openly and knowingly took Advantage thereof, to get themselves elected as Magistrates and Common-council Men of that Town; and particularly the Appellant Mr. Mill, as a Magistrate, was accessary thereto, he being one of the Magistrates of Town, at that Time: For tho' the Town Council as such, have no Jurisdiction, yet Mr. Mill, as a Magistrate, might have join'd with Mr. Muirison, who was another Magistrate then present, and they two as such, might have order'd the imprison'd Members to have been set at Liberty, upon giving good Bail, which Privilege ought not to be refus'd to any Subject, who is not imprison'd for some heinous Crime.

Rob. Raymond.

Will. Fraser.

Mill and others, Appellants.  
Col. Reid and others, Respondents.

### The Respondents CASE.

To be heard at the Bar of the House of  
Lords, on Thursday the 23d of May  
1723.

*affirmed*